allow a holder, relying solely on his title to the note, to recover in quasi-contract seems clearly anomalous. The doctrine, however, might be considered as simply making the value of the necessaries a limit below which the incompetent, in asserting his defense, may not go. Such a partial defense would at first glance seem exceptional. But the defense is neither an equitable plea, since it is available against *bonâ fide* purchasers, nor a denial, since it admits the formation of a contract. It may, however, be explained as a defensive procedural bar to enforcement, like the statute of limitations, available as to the excess of the contract liability over the value received. On this basis the plea would be equally applicable when the instrument is not given for necessaries. This view makes possible a consistent theory to explain the various decisions and would seem correct on public policy. The insane deserve protection, and a fair limitation is found in making the estate liable for the full value of the consideration actually received.

Drunkenness, where the negotiable instrument is held by a *bonâ fide* purchaser, may be distinguished. Here the signer has voluntarily put himself into a condition in which foolish business acts are likely. To permit him to throw the loss occasioned by his own recklessness on an innocent purchaser for value would be unfair. As it is no longer a question of distributing the loss between two innocent parties, the defense should not be allowed where there is no fraud or unfair conduct on the part of the holder.

What construction will ultimately be put on the somewhat ambiguous provision in the Negotiable Instruments Law as to defenses available against holders in due course is uncertain.[8] The view suggested, however, makes incapacity neither an obstacle to the creation of a negotiable instrument nor an equitable plea, but offers a bar to enforcement, like the plea of the statute of limitations. And, as the act can hardly contemplate abrogating the statute of limitations, similarly incompetency, considered as a purely procedural defense, should be outside the meaning of the act.

AVOIDING SERVICE OF JUDICIAL MANDATES AS CRIMINAL CONTEMPT. — The frequent avoidance of service of judicial process by witnesses and defendants and the lax public attitude toward such practices makes of practical importance the question how far criminal such avoidance is or how far improper it is for a lawyer to inspire such conduct. In general any act which directly obstructs the course of justice is punishable as a misdemeanor or as contempt of court.[1] Thus if a subpœna has been

Met. 387; Dubose *v.* Wheddon, 4 McC. (S. C.) 221; Haine *v.* Tarrant, 2 Hill (S. C.) 400; Bradley *v.* Pratt, 23 Vt. 378.

[8] NEGOTIABLE INSTRUMENTS LAW, § 57: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 2 ed., p. 65. See 50 Am. L. Reg. N. S. 471, 489.

[1] Rex *v.* Tibbits, [1902] 1 K. B. 77; Skipworth's Case, L. R. 9 Q. B. 230; Globe Newspaper Co. *v.* Commonwealth, 188 Mass. 449, 74 N. E. 682.

served it is contempt for a stranger to intimidate,[2] or remove the witness,[3] or for the witness himself to refuse to testify.[4] Such acts are obviously serious obstructions to the course of justice, since the evidence thus lost will cause, or tend to cause, an incorrect verdict. The crime of perjury puts no more serious an obstacle in the path of administering justice than do acts of this character. Such acts would seem to be no less an obstruction of justice merely because the subpœna had not been served. A recent case is authority for this position, holding that a stranger puts himself in contempt of court by attempting to persuade a witness, who had not yet been served, to conceal himself. *Rex* v. *Carroll*, [1913] Vict. L. R. 380.[5] *A fortiori*, it is true that a material witness by actively avoiding subpœna is obstructing the free course of justice and is guilty of a crime. Moreover, the fact that the subpœna has not actually been issued should not change the result, since it does not make it any less an active concealment of testimony.[6] Another recent case represents the better opinion [7] and convicts of contempt a witness who absented himself before the subpœna had been issued. *Aaron* v. *State*, 62 So. 419 (Miss.). To make such a thing criminal, however, all the elements of a crime must be present.[8] There must be *mens rea*. There must be an act. For instance, it would not be criminal for one wanted as a witness not to disclose himself, for to remain undisclosed is mere non-feasance.[9]

Where the advice of an attorney causes the witness to commit the crime in question, the attorney would also be guilty. But aside from being a crime, any such act by one who is an officer of the court is highly unethical and ground for disbarment.[10]

Another sort of mandate is a summons to the defendant in a civil suit. It has been said [11] and is commonly thought by practitioners that for a defendant to avoid process in his own case is legitimate. A consideration of the principles involved sustains this view, and shows that this is not inconsistent with convicting of crime a witness who avoids being subpœnaed. Courts may punish for contempt those who insult it in its presence,[12] but avoiding process in one's own case is clearly not a direct insult.[13] Also courts may coerce by imprisonment those who dis-

[2] Shaw *v.* Shaw, 8 Jur. N. S. 141.

[3] Hale *v.* State, 55 Oh. 210, 45 N. E. 199.

[4] *In re* Merkle, 40 Kan. 27, 19 Pac. 401.

[5] *Accord*, Commonwealth *v.* Berry, 141 Ky. 477, 133 S. W. 212; *In re* Brule, 71 Fed. 943; State *v.* Keyes, 8 Vt. 57. See *contra*, United States *v.* Coldwell, 2 Dall. (U. S.) 333, 334. The difference in result between Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148, and Broderick *v.* Genesee Circuit Judge, 125 Mich. 274, 84 N. W. 129, is based on the construction of a statute in the later case which is *contra* to *In re* Brule, 71 Fed. 943.

[6] *In re* Brule, 71 Fed. 943. *Contra*, McConnell *v.* State, 46 Ind. 298.

[7] Durham *v.* State, 97 Miss. 549, 52 So. 627. See also State *v.* Keyes, 8 Vt. 57, 66; Rex *v.* Carroll, [1913] Vict. L. R. 380, 382, Oct. 8 N. Y. L. J. 148. But see 17 Law Notes 104.

[8] See 25 HARV. L. REV. 375.

[9] Anderson *v.* State, 27 Tex. App. 177.

[10] In the matter of Robinson, 140 App. Div. 329, 125 N. Y. Supp. 193.

[11] See *In re* Rice, 181 Fed. 217, 221.

[12] See 21 HARV. L. REV. 163.

[13] *In re* Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900. See also 21 HARV. L. REV. 166–170.

obey its decrees. Such disobedience though called contempt is entirely different from criminal contempt. Obstructing the course of justice is a third kind of contempt,[14] but avoiding summons scarcely falls within it. In the first place, it may be argued that if a defendant absents himself the trial will merely be delayed, while if a witness does not appear an unjust verdict may be obtained. Again, it would seem that the true function of a court is to give remedies solely to those who, having suffered a wrong, ask redress against a wrongdoer over whom the court has jurisdiction. If the summons is for a wrongdoer only temporarily present, the court has no jurisdiction unless he is personally served.[15] Avoiding service, then, has the effect of preventing a court from securing jurisdiction and does not obstruct it in the exercise of its functions. If the wrongdoer is domiciled in the territorial jurisdiction, the court may render judgment without personal service,[16] and his concealment is merely a delay. Since there seems to be no such crime as delaying the course of justice, avoiding summons would seem not to be a crime.[17]

LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — A recent case holds that one who gratuitously undertakes to conduct a transaction as agent for another, and begins to act under the authority conferred, is liable in tort for failure to complete the transaction, notwithstanding his principal was not prejudiced by what he had actually done. *Condon* v. *Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548.[1] In this case the defendant, having gratuitously agreed to procure the immediate cancellation of an insurance policy issued by the plaintiff, delayed doing this while his sub-agent was investigating the risk, and before the investigation had been completed the loss occurred. The court argues that the agent in this case committed a misfeasance; but a misfeasance is a culpable act causing damage to the plaintiff,[2] while here the damage is due, not to the defendant's act, but to his failure to perform an undertaking. To support the decision, therefore, it must be held that the defendant has in some way assumed a legal duty to perform what he has agreed.

It has been ingeniously contended that there is a class of duties which

[14] State *ex rel.* Morse *v.* District Court, 29 Mont. 230, 74 Pac. 412. In this case a court was obstructed in considering a writ of habeas corpus by the defendant handing the body over to extradition knowing of the writ but before service, and thus putting it out of the court's control. The Cape May and Schellenger's Landing R. Co. *v.* Johnson, 35 N. J. Eq. 422. Here the defendant knowing of an injunction but before he had been officially notified, disobeyed it. In both cases fines were imposed.

[15] See Melkop and Kingman *v.* Deane and Co., 31 Ia. 397, 402.

[16] Henderson *v.* Standiford, 105 Mass. 504.

[17] The case where the defendant resists the process server with physical force is clearly distinguishable. He is guilty of a crime (see Conover *v.* Wood, 5 Abb. Prac. 84, 88), because the public good requires officers to perform their functions without overcoming resistance. (See 1 BISHOP, CRIMINAL LAW, 7 ed., sec. 465.)

[1] The following decisions might be thought to support the result in the principal case: Wilkinson *v.* Coverdale, 1 Esp. 75; Johnston *v.* Graham, 14 U. C. C. P. 9; see also Thorne *v.* Deas, 4 Johns. (N. Y.) 84, 97; Vickery *v.* Lanier, 1 Metc. (Ky.) 133, 135.

[2] Bell *v.* Josselyn, 3 Gray (Mass.) 309; Illinois Central R. R. Co. *v.* Foulkes, 191 Ill. 57, 68, 60 N. E. 890; see 2 BOUVIER'S LAW DICTIONARY, 421.